Supreme Court, U.S
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In The

Supreme Court of the United States

Michael J. Garcia,

Petitioner

v.

Board of Education of the
Eaton Rapids Public Schools

Respondents

On Petition For A Writ of Certiorari
To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the status of being "certificated" for teaching a property interest protected by the Fourteenth Amendment of the U. S. Constitution?

II. Is denial of the opportunity to present oral argument opposing a motion for summary judgment a violation of the Fourteenth Amendment of the U. S. Constitution?

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WRIT OF CERTIORARI

Petitioner Michael J. Garcia, a certificated first-year probationary teacher, respectfully prays that a writ of certiorari be issued to review the judgment of the Michigan Supreme Court and the tribunals below it in this case. In plain disregard of the U. S. Constitution, the government and state court system have denied petitioner's motions to appeal, for rehearing, or for reconsideration.

The courts in Michigan have demonstrated an exercise of judicial power which appears designed to ignore the basic Constitutional rights due to qualified citizens of the United States. Because such protections are ultimately governed by the U. S. Constitution and congressional enactments, as well as by state law, the unconstitutional actions of the Michigan court system involve issues of the utmost federal importance.

OPINIONS BELOW

On April 29, 1999, petitioner was hand-delivered a copy of a resolution from the Board of Education of Eaton Rapids Public Schools, approved at their meeting of April 28, 1999, for non-renewal of contract for petitioner (see Appendix A).

After petitioner appealed the school board's decision to the State Tenure Commission, the school board submitted a motion for accelerated and summary judgment, and the administrative law judge assigned to the case granted the school board's motion on August 27, 1999 (see Appendix B).

After petitioner filed exceptions to the ALJ's decision, the State Tenure Commission then issued an order on November 8, 1999 (see Appendix C) denying petitioner's initial appeal and letting stand the ALJ's decision to grant the school board's motion for accelerated and summary judgment.

Petitioner then appealed to the Michigan Court of Appeals and that court issued an order denying petitioner's application for leave to appeal on January 28, 2000 (see Appendix D). Afterwards petitioner submitted to that same court a motion for rehearing, but the Michigan Court of Appeals issued an order on April 6, 2000 (see Appendix E) denying petitioner's motion for rehearing.

Petitioner appealed subsequently to the Michigan Supreme Court and on October 30, 2000, that court ruled to deny petitioner's application for leave to appeal (see Appendix F). Petitioner then submitted to that same court a motion for reconsideration, but the Michigan Supreme Court issued an order on March 27, 2001, denying petitioner's motion for reconsideration (See Appendix G). On April 6, 2001, however, the Michigan Supreme Court issued an amended order (see Appendix H) correcting an inaccurate date on its previous order, but not changing the denial of petitioner's motion for reconsideration.

BASIS FOR JURISDICTION IN THIS COURT

The jurisdiction of this Court rests on 28 U. S. C. §1257, that pertains to the Court's review of cases that meet the criteria for certiorari, and on 28 U. S. C. , § 2101 pertaining to any writ of certiorari

intending to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review.

Under the authority of Public Act No. 4 of the extra session of 1937, as amended, of the Michigan Compiled Laws, known as the Teachers' Tenure Act, the decisions and judgments below allow the parties listed herein to carry out the following:

1. the respondent, the Board of Education of the Eaton Rapids Public Schools, to stand by its decision of non-renewal of contract for the petitioner, a certificated first-year probationary teacher;

2. the State Tenure Commission, to stand by its decision to grant respondent its request for accelerated and summary judgment; and

3. the Michigan Court of Appeals and the Michigan Supreme Court, to stand by their decisions not to allow appeal and/or requests for rehearing or reconsideration.

The judgments of the decisions below therefore are "final" for purposes of this Court's jurisdiction under 28 U. S. C. §1257.

Petitioner expressly and repeatedly raised in the courts below, the federal question of violation of due process under the U. S. Constitution. Failure by all parties at each level of the appeal process, however, to address that question, has given the petitioner no other recourse but to appeal to the U. S. Supreme Court if such is to be done. This case is therefore the proper jurisdiction of this court which is the court of last resort and because the courts below

have not sufficiently addressed the questions of law pertaining to the Constitutional rights of the petitioner. Such jurisdiction is consistent with numerous Supreme Court cases interpreting the due process clauses to require federal courts to be the final arbiters of state actions that deny due process procedural protections.

In cases such as this one involving violations of "property" interests, due process, and equal protection of the laws, only the federal courts can legally decide on the Constitutional issues involved.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment of the U. S. Constitution provides, in pertinent part, that,

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The due process clause in the state Constitution of Michigan is in Article I, Section 17, and is entitled Self-incrimination; Due Process of Law; Fair Treatment at Investigations; it reads as follows:

> Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty or property, without due process of law. This right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

State statutes include pertinent sections or clauses of Public Act No. 4 of the extra session of 1937, as amended, of the Michigan Compiled Laws, known as the Teachers' Tenure Act and of the Michigan Administrative Procedures Act (MAPA) which will be set out verbatim herein as needed with appropriate citation, particularly for court rulings pertaining to them.

STATEMENT OF THE CASE

This case involves the Constitutionality of the manner in which a certificated first-year probationary teacher was dismissed and then mistreated by the board of education and the state's court system while appealing his nonrenewal of contract. Due process should limit a governmental body's power to deprive citizens of certain protected rights without first observing appropriate procedural restraints, such did not occur for the petitioner.

Put straight forward, this case is chiefly about the fact that the petitioner was never afforded an opportunity to present oral argument on his behalf to his accusers, nor to the tribunals siding with his accusers, before, during, or after the entire appeal process, starting from the school board level up to the state supreme court level.

As such, they deprived a certificated first-year probationary teacher of his only means of livelihood, while denying his Constitutional privileges and immunities. Petitioner now comes to the U. S. Supreme Court as the court of last resort to rectify what the Michigan Supreme Court and the tribunals below it failed to do.

Denial of petitioner's due process procedural protections, property interests, as well as denial of equal protection of the laws under the Fourteenth Amendment are herein described.

REASONS FOR GRANTING THE WRIT

This case involves Constitutional issues pertaining to "property" interests, due process procedural protections, and equal protection of the laws. Potential or actual abridgement of these Constitutional rights are therefore the purview of the Supreme Court and must needs to be addressed by granting the writ.

The Court should grant this writ therefore to reestablish the supremacy of the U. S. Constitution despite states' rights to create tenure and other state laws that impact on how tenure is granted or denied. As will be shown herein, applicable federal law and court precedents that should have been considered to protect the petitioner's individual rights in this case, were not. This case therefore, will give the Court another way to examine if important federal questions were sufficiently and properly addressed by the state courts.

"The issue of whether a federal question was sufficiently and properly raised in the state courts

is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *State v New York*, 394 U. S. 576, 583 (1969). See also *Black* v *Cutter Labs.*, 351 U. S. 292, 298 (1956). Accordingly, a state court cannot evade this Court's review by failing to discuss federal questions in its decisions.

In *Chapman* v *Goodnow's Adm'r.*, 123 U. S. 540, 548 (1887), the Court determined,

> If a federal question fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right...as if it has been specifically referred to and the right directly refused.

Herein are described the pertinent events that resulted in the violation of the basic Constitutional rights of a certificated first-year probationary teacher:

On April 28, 1999, the Board of Education of Eaton Rapids Public Schools approved a resolution for nonrenewal of contract for the petitioner (see Appendix A). The board of education, however, never provided advance verbal nor written direct notification to the petitioner of the specific time, date, or place of the school board's intention to consider and/or vote on whether or not to re-employ the petitioner. The school board's actions on the day of their meeting did not afford petitioner an opportunity, therefore, to present oral argument on his behalf or to obtain counsel to speak on his

behalf. The school board, however, went to great lengths to have its counsel present and at the ready at that specific meeting.

The following day, a letter and a copy of the school board's resolution not to re-employ the petitioner were hand-delivered to the petitioner (see Appendix A). The letter to the petitioner also informed him, in pertinent part, of the following:

> "Although we do not believe that you have acquired any rights as a tenure teacher under the Tenure Act, if you believe...that any of your rights under the Tenure Act have been violated, you are hereby notified that you must initiate any appeal(s) to the State Tenure Commission within twenty (20) days of your receipt of the enclosed Resolution and this Notice. A probationary teacher has a right to appeal the timeliness or legal effect of a notice of unsatisfactory service."

The Court will note that the board of education was predominantly concerned about the applicability to the petitioner of legal precedent under the state teachers' tenure act. Had the board considered the tenure act's mention of "certificated" as a factor, and that the petitioner was "certificated," they might have handled the decision to dismiss differently. Had they been advised by their counsel, as well, of the applicability, therefore, of petitioner's due process rights under the U. S. Constitution and the Michigan Constitution, they might also have done otherwise.

Eleven days later, on May 10, 1999, petitioner filed a grievance (#98-99:23)[1] which stated, in pertinent part, the following:

> On April 28, 1999, the administration submitted the teacher's name to the Board of Education to be included among those who would be recommended for non-renewal of contract. This was done without any specific, and ADVANCE, oral or written notice given to the teacher by the administration of the specific date and time that Board action on the teacher's case, IN PARTICULAR, would take place. Thus the teacher was unable to defend himself, with or without a lawyer, before the Board of Education. This oversight and neglect by the

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[1] In a memorandum dated July 20, 1999, almost three months after the nonrenewal of contract, the Board of Education of Eaton Rapids Public Schools responded with the following remarks:

"Under the Michigan Teachers' Tenure Act, probationary teachers facing contract nonrenewal are not entitled to a hearing before the Board of Education. There is dispute regarding whether Dr. Garcia was aware of the administrative recommendation and the fact that the Board of Education was considering that recommendation at its April 28, 1999 meeting. The committee believes that Dr. Garcia was verbally advised of these facts and regrets that he was not advised in writing. Although the grievance is denied, as relief Dr. Garcia is provided with the opportunity to make a written presentation to the Board of Education with the understanding that this shall not create a precedent."

> administration constitutes a violation of the teacher's contract, state law, and/or the U. S. Constitution guarantees of due process.
>
> A teacher has a right to receive specific oral or written advance notice from the administration of the specific time and date when the Board of Education is about to cut off that teacher's means of livelihood. This advance notice is necessary if an employee is to have the basic right to defend him/herself before a duly elected/appointed entity. To have it otherwise, would be a violation of the principle of due process guaranteed under the U. S. Constitution, whether or not there is express language to that effect in the current teacher's contract.

Additionally, on May 24, 1999, petitioner filed timely a Notice of Appeal and Petition to the State Tenure Commission repeating what the petitioner had said in his grievance (quoted above), and added the following: "This oversight and neglect by the administration constitutes a violation of the teacher's guarantee of due process under the Constitution of the United States of America."

Shortly thereafter, on June 14, 1999, petitioner submitted a prehearing conference questionnaire to the Tenure Commission which was prefaced in part by the following statement:

> As a matter of legal principle, therefore, nothing should be done by school districts while carrying out the language of the Tenure Act to either overlook, ignore, or justify violations of the basic law of the land, i. e., the Constitution of the United States of America, under the guise of correctly implementing the language of the Tenure Act. Administrators, superintendents, and controlling boards of education cannot be allowed to arbitrarily or capriciously discipline first-year probationary school personnel without accountability to the legal rights of such personnel under the teacher's contract, under the Teachers' Tenure Act, and/or protections afforded by the U. S. Constitution.

Having informed the administrative law judge of what the school board had done in violation of due process, the ALJ then, too, violated due process when he did not afford petitioner an opportunity to present oral argument on his behalf prior to the granting of the school board's motion for accelerated and summary judgment. This event likewise violated the petitioner's federal and state procedural due process rights and will be addressed in part two of this brief below.

Subsequent to the above events, in his appeals and motions for rehearing or reconsideration, petitioner informed Michigan's Court of Appeals and

the Michigan Supreme Court as well of the above violations of due process, but to no avail.

In his final motion for reconsideration to the Michigan Supreme Court, the petitioner went even further, again to no avail, and informed that court of the violation, in his case, of one of its own court precedents. This precedent was a ruling in which one of the litigants was not afforded an opportunity present oral argument opposing a summary judgment; as such, the supreme court remanded the case to the lower level to allow for oral argument before summary judgment could be permitted.

Parts I and II below address the questions presented to the Court for review.

I. The status of being certificated for teaching is a property interest protected by the Fourteenth Amendment to the U. S. Constitution.

As a matter of legal principle nothing should be done by school districts in a decision for nonrenewal of a certificated first-year probationary teacher's contract that deprives the teacher of "liberty" or "property" interests protected by the Fourteenth Amendment. The Michigan Supreme Court and the tribunals below it, however, ignored violations of petitioner's basic Constitutional protections, some of which stem from entitlements to the petitioner from the Teachers' Tenure Act.

The Teachers' Tenure Act of Michigan was written in part to address the concept of "continuing tenure", i.e., attainment of tenure for certificated teachers in Michigan's public schools, to

provide for probationary periods, and to regulate discharges or demotion.

In the Teachers' Tenure Act, Article I, MCL 38.71; MSA 15.1971, §1, Clauses (1),(2), & (4) state as follows (underlining added for emphasis):

> Section 1.
>
> (1) The term "teacher" as used in this act means a certificated individual employed for a full year by any board of education or controlling board.
>
> (2) An individual who is not certificated but is employed for a full year pursuant to section 1233b of the revised school code, Act No. 451 of the Public Acts of 1976, being section 380.1233b of the Michigan Compiled Laws, or is employed pursuant to an annual vocational authorization or a temporary approval, as defined in state board rule, is considered to be a teacher for the purpose of serving the probationary period under Article II, but such an individual is not considered a teacher for the purpose of continuing tenure under Article III until he or she becomes certificated.
>
> (4) Teacher does not include an individual whose teacher certificate has expired or has been suspended or revoked.

In other words, continuing tenure in Michigan cannot be achieved until an individual attains and maintains the status of being "certificated." Section 2 of Article I of the Teachers' Tenure Act, MCL

38.72; MSA 15.1972, defines "certificated"as follows:

> Section 2.
>
> The term "certificated" means holding a valid teaching certificate, as defined by the state board of education. For purpose of this section, an individual is considered to be holding a valid teaching certificate if the individual has on file with his or her employing school district either an appropriate teaching certificate issued by the state board of education or, if the individual's application for a teaching certificate has not been confirmed or rejected by the state board, written evidence from the individual's teacher education college that he or she meets the requirements described in section 1535 of the school code of 1976, Act No. 451 of the Public Acts of 1976, being section 380.1535 of Michigan Compiled Laws.

When one considers how important being "certificated" is for school teachers in Michigan, one can see that this entitlement is as important to a teacher, or a would be teacher, as the entitlement of a license to practice is for a doctor or a lawyer.

What precedes the holding of a valid teaching certificate in the State of Michigan (and other states) usually involves attending four to five years of college, taking a course of study with emphasis on some specialization in the field of education for teaching at the elementary, middle school or high school levels, plus doing an internship of one or two

college semesters, usually referred to as student teaching. Individuals wishing to be certificated have to meet the minimum requisites for completion of their studies and student teaching, plus be of good character.

The investment in effort, time, and money in just getting "certificated," prior to even getting a teaching job, is needless to say, very great. But being certificated opens the door to a potential lifelong teaching job and is usually seen as the first major hurdle to overcome in becoming, legally speaking, a "teacher," as defined by the Teachers' Tenure Act, Article I, MCL 38.71; MSA 15.1971, §1, Clause (1) cited above.

Having the designation of being "certificated" (and staying certificated) is therefore technically important in attaining and retaining "continuing tenure" upon completion of a certificated person's probationary period after being hired as a probationary teacher. Until such an individual successfully completes his/her probationary period, however, that individual has the classification "probationary teacher." In Michigan, the goal to reach for a certificated first-year probationary teacher is to attain the classification of a non-probationary teacher with "continuing tenure" after the successful completion of four years of employment. This is because Article II, §1, Clause 1, MCL 38.81; MSA 15.1981 (1) of the Teachers' Tenure Act states that "a teacher is in a probationary period during his or her first 4 full school years of employment."

Nevertheless, through the concept of "certificated" as defined in the Teachers' Tenure Act, the state legislature in Michigan has in essence created a legitimate expectation for probationary teachers, grounded in state law, for attaining continuing tenure. A "certificated" individual under Michigan state law is technically in a better position, therefore, for obtaining continuing tenure more so than a person who is not certificated. Thus the possession of "certificated" status rightly falls under the rubric of the Fourteenth Amendment concept of "property." "Property interests...are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..." *Board of Regents* v *Roth* 408 U. S. 564;92 S. Ct. 2701; 1972. Having "certificated" status should therefore be accorded due process protection under the Fourteenth Amendment.

Both the Constitution of Michigan and the U. S. Constitution use the same words in reference to a person's right to due process: "nor be deprived of life, liberty or property without due process of law." Furthermore, the due process clause in Article I, Section 17 of the Michigan Constitution (quoted in full above) guarantees that the right of all individuals to fair and just treatment in the course of executive hearings shall not be infringed. As such, the two due process clauses of the state and federal constitutions call for due process procedural protections if a governmental body, such as when a school board, acts to deprive a certificated first-year probationary teacher of "liberty", or "property." Both the U. S. and Michigan constitutions,

therefore, call for some form of prior administrative or academic hearing on cause for non-renewal of a teacher contract.

More importantly, however, due process procedural protections are protections under the Fourteenth Amendment, whether or not state law provides for such procedures or school boards wish to recognize them. In *Perry et al* v *Sindermann*, 408 U. S. 593; 92 S. Ct. 2694; 1972, the Supreme Court ruled that a non-tenured teacher should be afforded a hearing pertaining to a decision by his employer for non-retention if it could be shown that the non-retention deprived the teacher of some interest in "liberty" or "property" protected by the Fourteenth Amendment.

For the status of being "certificated" to be "property" under the Fourteenth Amendment, however, it must be an interest enforceable by law, which the Teacher's Tenure Act specifically does, because it prescribes penalties for violation of the provisions of the act.

Section 2 of Article I of the Act, MCL 38.72; MSA 15.1972, (see language cited above) states clearly that "certificated" means holding a valid teaching certificate, and that an individual is considered to be holding a valid teaching certificate if the individual has on file with his or her employing school district either: a) an appropriate teaching certificate issued by the state board of education, or b) written evidence from the individual's teacher education college that he or she meets all of the requirements.

Being "certificated" statutorily requires therefore one of two concrete ways that prove one's status. The petitioner in the instant case had both concrete proofs on file with the school district, thus giving him a legitimate claim of entitlement under state law. Petitioner, therefore, had an implied contract that he would be hired, and if not, at least be given the procedural due process opportunity to respond to those not wanting to hire him, i.e., the school board.

The Supreme Court has come to recognize more concrete characteristics of Fourteenth Amendment "property." In *Board of Regents supra*, for example, the Court pointed out that certain attributes of property must be evident if it is to be protected by procedural due process; for example, a person

> "must have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Additionally, Chief Justice Burger emphasized in *Perry et al supra* the following point about procedural due process protections:

> "...the point should be underscored that the relationship between a state institution and one of its teachers is

> essentially a matter of state concern and state law, and that it is only when a state-employed teacher has a right to re-employment under state law arising from either an express or implied contract that he then, in turn, has a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for non-renewal of his contract."

Justice Marshall, in *Perry et al supra* further added:

> ...the respondent was denied due process when his contract was not renewed and he was not informed by the state university of the reasons for the nonrenewal nor given any opportunity to respond.

Petitioner in the instant case, was likewise not given any opportunity to respond, and was never given (either before, during, or after his nonrenewal of contract) even one opportunity to possibly vindicate himself, thus depriving him of his procedural due process protection of his "property" interests, i.e., being "certificated."

This was due in large part to the fact that he was never told verbally or in writing by anyone of the specific time and date that the school board would vote to deny him (as a "certificated" individual) further opportunity to work toward continuing tenure. Furthermore, when the petitioner complained, the school board claimed in a written

memo that, "Under the Michigan Teachers' Tenure Act, probationary teachers facing contract nonrenewal are not entitled to a hearing before the Board of Education." (See footnote 1 above.)

In *Perry et al supra*, however, the U. S. Supreme Court found that a teacher's lack of a contractual or tenure right to re-employment, taken alone, did not defeat his claim that the nonrenewal of his contract to teach violated his Constitutional rights.

In *Perry supra*, the Court concluded as well that a non-tenured teacher is entitled to a hearing if he or she can show that non-retention deprived that individual of some interest in "property" protected by the Fourteenth Amendment. The interest in "property" that the petitioner, a certificated first-year probationary teacher, had, was that his being "certificated" would eventually enable him to attain statutorily-defined "continuing tenure."

In order for an individual to be entitled to the "property" benefits of continuing tenure, however, that individual must fulfill the statutory definition of a "teacher," which requires that the individual be what is statutorily-defined as "certificated." Being "certificated," therefore should be a "property" interest protected by the Fourteenth Amendment; this is because being "certificated" meets the criteria for property interest as defined by the Supreme Court in *Board of Regents supra*, i.e., its "dimensions are defined by existing rules or understandings that stem from an independent source such as state law."

The petitioner's "property" interest of being "certificated" was created by the Michigan legislature, i.e., it stemmed from the existing rules in the state law in Michigan known as the Teachers' Tenure Act. "Legislatures create property, and courts protect it," *Peter N. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry,* 71 California Law Review, January 1983, yet no board of education, administrative law judge, tenure commission, court of appeals or supreme court in Michigan did so.

II. Denial of the opportunity to present oral argument opposing a motion for summary judgment is a violation of the Fourteenth Amendment of the Constitution of the United States.

When the ALJ in this case granted the school board's motion for summary judgment without first affording the petitioner an opportunity to present oral argument opposing the motion, the ALJ denied the petitioner procedural due process. When the State Tenure Commission concurred with the judge's decision, they, too, therefore, denied the petitioner procedural due process protections.

When the Michigan Supreme Court was told of the violation of its own court precedent in *Smith* v. *Lansing School District,*428 Mich 248 (1987) by the ALJ and the Tenure Commission, the court denied the petitioner equal protection of the laws when it did not remand the case and require a hearing as it had required in *Smith supra.* In that case, the Michigan Supreme Court stated,

> Requiring that an opportunity be afforded to present oral arguments helps guard against the dismissal of meritorious claims on the basis of the technical insufficiency or inadequacy of the written pleadings, and facilitates the performance of the obligation to "inquire fully into the facts involved in the proceeding," before rendering a decision and recommended order.

Events leading up to the denial of due process and denial of equal protection of the laws included the following:

After having held a prehearing conference, the ALJ in the case issued a notice of hearing on June 17, 1999, that an evidentiary hearing was to be held on September 8, 10, &13, 1999. That notice stated as follows:

> The hearing is for the purpose of determining the issues set forth in the petition and answer filed in this cause and whether the relief sought should be granted. The hearing will be conducted under the provisions of Article IV and Article VI of the Teachers' Tenure Act, being MCL 38.101 to 38.105 and 38.121; 1979 AC, R38.172 and the Administrative Procedures Act of 1969 being MCL 24.201 to 24.315.

It should be noted that MCL 24.272(3), MSA 3.560(172) of the Michigan Administrative Procedures Act of 1969 (known as MAPA) is

included numerically in the above-cited statutes. It should be noted as well, that Article IV of the Teachers' Tenure Act is mentioned above and that Article IV, MCL 38.104; MSA 15.2004, §4, Clause (4) of that act, mandates:

> Except as otherwise provided in this section, the hearing shall be conducted in accordance with chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws, and in accordance with rules promulgated by the tenure commission.

Again, it should be noted that MCL 24.272(3), MSA 3.560(172) of the Michigan Administrative Procedures Act of 1969 is included numerically in the above-cited statutes. Thus, the petitioner expected that the above-cited statutes would be adhered to.

However, the school board then submitted a motion for accelerated and summary judgement on July 6, 1999, and the petitioner then submitted a written response on July 19, 1999 to appellee's motion for accelerated and summary judgement. The ALJ then issued a decision granting appellee's motion for accelerated and summary judgement on August 27, 1999, <u>without allowing the petitioner the opportunity to present oral argument opposing appellee's motion for accelerated and summary judgment</u> as required by MCL 24.272(3), MSA 3.560(172) of the Michigan Administrative

Procedures Act (known as MAPA) which specifically requires, that:

> (3)The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and arguments on issues of fact.

Such was not done, however, by the ALJ in the instant case, despite the fact that petitioner in the instant case submitted affidavit, after affidavit, after affidavit to raise the issue of fact. This would appear to be in conflict with Article I, Section 17 of the Michigan Constitution which guarantees that the right of all individuals to fair and just treatment in the course of executive hearings shall not be infringed.

Historically, however, the State Tenure Commission, has denied a motion for accelerated and/or summary judgement recommended by the ALJ when the facts gleaned from the pleadings and other documents demonstrate that further evidence should be presented as to what actually occurred. For example, in *Loeffler* v *Monroe Public Schools*, TTC 84-25 (Decision dated November 1, 1985), the Tenure Commission stated:

> Finally, because appellant's affidavits raise the possibility that the procedures outlined in the consortium agreement were not followed in some instances, we think that evidence should be presented as to what actually occurred. Thus, we conclude that accelerated

> and/or summary judgement is inappropriate at this stage of the proceedings. It is necessary to hold a hearing to determine the employment status of appellant vis-a-vis appellee. (See also, *Rosemund* v *Warren Consolidated Schools*, TTC 84-7, at 8)

The Michigan Court of Appeals and the Michigan Supreme Court have also remanded cases to allow for either appellant or appellee to provide oral argument opposing a motion for accelerated and summary judgement. *Smith* v *Lansing School District*, 428 Mich 248 (1987)

In *Smith, supra* the state Supreme Court and the Court of Appeals before it, found that denial of an oral argument opposing the motion for summary judgement was in violation of the procedural rule contained in MCL 24.272(3), MSA 3.560(172) (quoted above) of the Michigan Administrative Procedures Act of 1969, Act No. 306 of the Public Acts of 1969, of the Michigan Compiled Laws.

In *Smith supra*, the Michigan Court of Appeals remanded the case back to the Michigan Employment Relations Commission (MERC), a parallel tribunal to the State Tenure Commission, and ruled that the MERC was not empowered to summarily dispose of complaints without granting an evidentiary hearing or permitting oral argument. Likewise, the Michigan Supreme Court ruled in *Smith supra* therefore, that violation of MCL 24.272(3), MSA 3.560(172) of MAPA warranted remand of that case back to the commission (MERC)

for further proceedings. In that case, the Michigan Supreme Court stated:

> We disagree with appellants, however, that the MERC may execute such a dismissal without affording the parties an opportunity to present oral argument opposing summary disposition. Section 72(3) of the MAPA specifically provides that the "parties shall be given an opportunity to present *oral and written* arguments on issues of law and policy..." In this case, it is clear that appellees were not afforded an opportunity to present oral arguments opposing appellants' motion to dismiss. We agree with the Court of Appeals that that denial warrants remand of this case to the MERC for further proceedings.

In the instant case, the petitioner an was given an opportunity to present "written" argument opposing to the motion for accelerated and summary judgment, but was not allowed to provide an opportunity to present "oral" argument for that purpose. As such, the ALJ did not comply with:

a) the legal precedent set down by the Supreme Court in *Smith* v *Lansing School District*, 428 Mich 248 (1987);

b) the Michigan Administrative Procedures Act(MAPA), MCL 24.272(3), MSA 3.560(172);

c) of Article IV, MCL 38.104; MSA 15.2004, Section 4, Clause (4) of the Tenure Act;

d) the due process clause in Article I, Section 17 of the Michigan Constitution which guarantees that the right of all individuals to fair and just treatment in the course of executive hearings shall not be infringed, and/or

e) the due process clause of the Fourteenth Amendment of the U. S. Constitution.

After the Michigan Supreme Court denied petitioner's leave to appeal, petitioner submitted a motion for reconsideration to that same court asking that it rule that the ALJ's denial of his rights under the *Smith supra* legal precedent and MAPA, warranted remand of the instant case to the Tenure Commission for further proceedings. The Michigan Supreme Court denied petitioner's motion for reconsideration, however, because the court thought that it did not appear that the order (to deny leave to appeal) was entered erroneously (see Appendix H). Had the court but examined its own ruling in *Smith supra*, it might have ruled otherwise. This omission by the Michigan Supreme Court was as serious as if it had overtly chosen to deny equal protection under the laws (and its own legal precedent in *Smith supra*).

Acts of omission, as well as acts of commission, constitute state action for purposes of determining whether such has brought about or caused a detriment. *Hart v Community School Board of Brooklyn, New York School District No. 21*, D. C. N. Y., 1974, 383 F. Supp. 699, affirmed 512 F.2d 37.

Also, in the case of *Hawkins* v *Town of Shaw, Miss.*, C. A. Miss. 1972, 461 F2d 1171, the court stated,

> "Equal Protection of the laws" means more than a mere absence of governmental action designed to discriminate, an arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as perversity of a willful scheme."

The action of state courts and of judicial officers in their official capacities is to be regarded, therefore, as "action of the state" within the Fourteenth Amendment. *Shelley* v *Kraemer*, Mich & Mo. 1948, 68 S. Ct. 836, 334 U.S. 1, 92 L.Ed. 1161. The Michigan Supreme Court's "arbitrary quality of thoughtlessness" denied the petitioner, therefore, equal protection of the laws under the Fourteenth Amendment to the U. S. Constitution. Under the Fourteenth Amendment, official action at any hierarchical level which denies plaintiffs equal protection of the laws is unconstitutional. *Berry* v *School District of Benton Harbor*, D. C. Mich. 1977, 442 F. Supp. 1280, affirmed and remanded on other grounds 698 F.2d 813, on remand 564 F. Supp. 617. See also, *Oliver v Kalamazoo Board of Education*, D. C. Mich. 1973, 368 F. Supp. 143, affirmed 508 F. 2d 178.

Whether the U. S. Supreme Court, therefore, finds that the Michigan Supreme Court denied equal protection of the laws and/or procedural due process, either of those two constitutional violations

would require remanding the case back to the State Tenure Commission to permit for an oral response.

In similar cases pertaining to nonrenewal of contract that have been heard by the U. S. Supreme Court, the Court has ruled that summary judgment against the dismissed teacher should not have been granted, rather, that a hearing should have been provided prior to determining the granting of summary judgment. In *Perry et al supra*, the Court said in such a hearing "the teacher could be informed of the grounds for his nonretention and be given an opportunity to refute them," and

> ...while the court did not agree with everything in the Court of Appeals opinion, it did agree that the District Court should not have granted summary judgment to the governing board and that the teacher should be granted a hearing by the college board, following which the matter could then come before the courts for review buttressed by the information developed at the hearing, and it would thus affirm the Court of Appeals' judgment on that basis.

In that same case, Justice Marshall felt that the teacher was denied due process when he was not given an opportunity to respond, and that the lower court should be directed to enter summary judgment for the teacher entitling him to a hearing on disputed issues of fact.

CONCLUSION

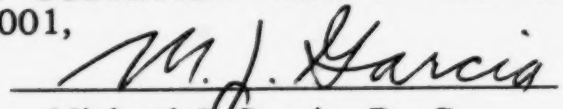
Due process procedural safeguards help further liberty; this point was underscored by Supreme Court Justice Felix Frankfurter when he wrote,

> "The history of liberty has largely been the history of observance of procedural safeguards." *Anthony Lewis, Gideon's Trumpet*, p. 221 (1964)

The U. S. Supreme Court has the function of regularly measuring state and local policy against the standards of the U. S. Constitution. State courts should be the front lines of defense for our federal Constitution, not its assaulters. States' rights do not include the right to ignore civilized decencies in the dismissal of certificated first-year probationary teachers. They, too, have rights.

Absent the most compelling reasons not to do so, this Court should therefore grant this petition for writ of certiorari and thereby ascertain if the actions of the Michigan Supreme Court and its lower tribunals violated the Constitutional due process rights of the petitioner. In doing so, the Court will advance the applicability of the words, "nor shall any state deprive any person of life, liberty or property, without due process of the laws."

RESPECTFULLY SUBMITTED THIS 4TH DAY OF SEPTEMBER, 2001,



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APPENDICES

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APPENDIX A

Hand-Delivered

Dr. Michael Garcia
Eaton Rapids High School

Dear Dr. Garcia:

Pursuant to resolution of the Board of Education of the Eaton Rapids Public Schools adopted at a regular meeting held on the 28th day of April, 1999, at 7:30 o'clock p.m., the Board of Education has determined your services as a probationary teacher to be unsatisfactory and accordingly denied your tenure status and nonrenewed your appointment as a teacher in this School District. Consequently, your services are terminated and discontinued effective at the end of the day on June 4, 1999. A certified copy of the Board resolution dated April 28,1999 is enclosed. Please regard this letter and the enclosed resolution as a written statement of unsatisfactory service for purposes of the School District's compliance with Article II, Section 3, of the Teachers' Tenure Act.

Although we do not believe that you have acquired any rights as a tenure teacher under the Tenure Act, if you believe that you have attained tenure or that any of your rights under the Tenure Act have been violated, you are hereby notified that you must initiate any appeal(s) to the State Tenure Commission within twenty (20) days of your receipt of the enclosed Resolution and this Notice. A probationary teacher has a right to appeal the timeliness or legal effect of a notice of unsatisfactory service. Such an appeal must

be filed with the State Tenure Commission within twenty (20) days of your receipt of the enclosed Resolution and this Notice. You may file this appeal with the offices of the State Tenure Commission at 608 W. Allegan, P.O. Box 30008, Lansing, Michigan 48909.

A copy of the Tenure Act has been enclosed for your consideration and review. Please refer in particular to the time limitations for appeal set forth in Article VI, Section 1.

Sincerely,

/s/ Edwin K. Hatler
Secretary, Board of Education

Enclosures: 1) Board Resolution of April 28, 1999
2) Teachers' Tenure Act

I acknowledge receipt of this Notice, attached Board of Education resolution and copy of the Teachers' Tenure Act.

Date:_____ Teacher:_____

Cc: Personnel File

EATON RAPIDS PUBLIC SCHOOLS
EATON RAPIDS, MICHIGAN

RESOLUTION NOT TO REEMPLOY
A PROBATIONARY TEACHER

A Regular Meeting of the Board of Education of the Eaton Rapids Public Schools, of Eaton and Ingham Counties, Michigan, was held in the Auditeria of Greyhound Intermediate School, at 805 Greyhound Drive, Eaton Rapids, Michigan on the 28th of April, 1999, at 7:30 o'clock, p.m.

The meeting was called to order by John Truba, President.

Present: Members Botti, Cobe, Hatler, Truba, Wichman

Absent: Members Wilson (departed at 9:30 p.m.)

The following preamble and resolution were offered by Member Cobe, and supported by Member Wichman:

WHEREAS, the Board of Education has reviewed the High School administrators' performance evaluations of Dr. Michael Garcia, a probationary teacher at Eaton Rapids High School,

NOW, THEREFORE, BE IT RESOLVED:

That the performance of Dr. Michael Garcia, a teacher in the Eaton Rapids Public Schools, is found to be unsatisfactory;

That Dr. Michael Garcia's services are hereby terminated as of the end of the current (1998-99) school year.

That the secretary of the Board is authorized and directed to send or otherwise deliver written notice to Dr. Garcia of this action, stating:

1. That his performance is unsatisfactory; and
2. That his services are terminated as of the end of the current school year.

That the secretary of the Board is authorized and directed to send or otherwise deliver a copy of this resolution and a copy of the Teacher Tenure Act to Dr. Garcia.

That the superintendent or her designee are hereby authorized by the Board to assist the Board secretary in effecting delivery of the said notice.

Ayes: Members Botti, Cobe, Hatler, Truba, Wichman

Nays: Members None

Motion declared adopted.

/s/ Edward K. Hatler
Secretary, Board of Education

I, the undersigned duly qualified and acting secretary of the Board of Education of the Eaton Rapids Public Schools, Eaton Rapids, Michigan do hereby certify that the foregoing is a true and complete copy of a resolution adopted by the Board of Education, Eaton Rapids, Michigan, at its Regular Meeting held on April 28, 1999, the original of which is part of the Board's minutes.

/s/ Edward K. Hatler
Secretary, Board of Education

APPENDIX B

STATE OF MICHIGAN
STATE TENURE COMMISSION

MICHAEL J. GARCIA,
Appellant

v Docket No. 99-13

BOARD OF EDUCATION OF THE
EATON RAPIDS PUBLIC SCHOOLS,
Appellee

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DECISION ON APPELLEE'S MOTION FOR ACCELERATED AND SUMMARY JUDGMENT

BACKGROUND FACTS

Appellant was hired during the 1998-99 school year. (See the affidavit attached to appellee's Motion For Accelerated and Summary Judgment) . On May 14, 1999, appellant filed a claim of appeal contesting appellee's decision of April 28, 1999, not to renew his contract for unsatisfactory

performance. The administrative law judge instructed appellant to submit an amended claim of appeal in compliance with the Commission's Rules. On May 24, 1999, appellant filed the amended appeal. Appellant based his appeal on appellee's failure to:

1. Prepare an individual development plan (IDP) and assess his progress in meeting the goals of his IDP.

2. Assign a mentor.

3. Provide suitable working conditions as specified in the contract.

4. Inform the appellant of the time and place when the board would convene to discuss his non-renewal of contract. Appellant claims that this failure to inform him of the time and place of the board meeting constitutes a violation of his due process rights under the Constitution of the United States of America.

5. Set up an evaluation conference, as required by the contract, with appellant before finalizing the evaluation and recommending to the board the non-renewal of his contract. Appellant claims these actions were in violation of his contractual rights and/or rights to due process under the Constitution of the United States of America.

6. Inform appellant of the date and hour of observations. Despite appellant's written request that he be so informed, appellant was observed on April 20, 1999, and April 21, 1999, without

prior notice. Also, appellant claims the last two observations were not 60 days apart.

7. Schedule post-observation conferences on the April 20 and 21 observations before the written evaluation based on those observations was provided to appellant, as required by the contract. Appellant contends these actions are in violation of the teacher's contractual rights and/or rights to due process under the Constitution of the United States of America.

8. Specify with particularity in the "evaluation of teacher effectiveness" document what specific behavior, in which formal observation and on what specific date led the administration to conclude what was written up in the evaluation. Appellant alleges there was fraud or lying in the written evaluations.

9. Sufficiently discuss and explain the first written evaluation provided to appellant at the end of the first semester. Also, failed to inform appellant that he would need union and/or legal representation at evaluation meetings. Appellant claims that these actions were in violation of his contractual rights and/or rights to due process under the Constitution of the United States of America.

10. Inform appellant, in accordance with the contract, that he was entitled to have the Association Building Representative at the meeting to discuss the written evaluation. Instead, appellant was forced to accept the representation of the building representative rather than the Uniserv

Director, thereby denying him representation of his choice. Appellant claims this was in violation of his contractual rights and/or rights to due process under the Constitution of the United States of America.

On July 6, 1999, appellee filed a motion for accelerated and summary judgment in response to appellant's assignments of error. With respect to the first assignment of error, appellee argues that a first year probationary teacher has no right to an IDP. In support, appellee points to MCL 38.83a; MSA 15.1983(1) which provides in part:

> (1) If a probationary teacher is employed by a school district for at least one full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed in consultation with the individual teacher and the teacher is provided with at least an annual year-end performance evaluation each year during the teacher's probationary period.
>
> ***
>
> Except as specifically stated in this subsection, this section does not provide a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

> (2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular year is conclusive evidence that the teacher's performance for that school year was satisfactory.

Appellee also relies on VanGessel v Lakewood Public Schools, 220 Mich App 37, 43; 558 NW2d 248(1996), *lv den* 456 Mich 891; 572 NW2d 9(1997) . In VanGessel, the Court of Appeals held that a district is not required to provide an IDP to a first-year probationary teacher. Given the Court of Appeals' ruling that a school district need not provide an IDP to a first-year probationary teacher, and since appellant falls in that category, appellee requests that it be granted summary judgment on this assignment of error.

Appellant counters by stating that the courts have recognized that the Act does not preclude a school district from providing an IDP to a first-year probationary teacher if it chooses. Appellant also relies on the decision in Van Gessel which states in pertinent part:

> Although a school district or controlling board may issue an IDP during the probationary teacher's first year, and by statute must issue one after the teacher completes a full school year and before the second year begins, we find no statutory language or policy otherwise mandating when the IDP must be given.

Appellant argues that once the board had chosen to require appellant to submit an IDP, appellee no longer comes within the terms of the VanGessel case and appellee is required to provide appellant an IDP. Appellant has provided what appears to be a copy of his proposed suggestions to be included in an IDP. See Exhibit 4 attached to appellant's brief in opposition to appellee's motion. The proposal was presumably signed by both appellant and the principal. (Appellant's Brief Exhibit 5) . In support of his allegation that he had acted on the proposal, appellant points to his memorandum of February 26, 1999, purportedly sent to Mr. Robert Lange, principal of the school where appellant taught. The memorandum is referenced to indicate that appellant had complied with a requirement pertaining to professional development which was one of the proposals advanced by appellant for inclusion in his IDP. (Appellant's Exhibit 6) Even though appellant was allegedly requested to provide a proposal for inclusion in the IDP to the principal, none was executed. Therefore, he requests that appellee's motion be denied on the ground that appellee waived its discretionary right not to formulate an IDP. Having waived its right, appellant failed to execute an IDP.

Appellant concedes, except for the alleged waiver, that he has no right to an IDP during his first-year probationary period. Further, in accord with VanGessel, supra, appellee is not required to formulate an IDP for appellant. It is not clear what rights appellee waived. Appellee has a right to encourage first year probationary teachers to improve their performance without executing an IDP. From what appellant has submitted as Exhibit

4, it appears that the principal had discussed ways in which appellant could improve on his performance. This does not amount to a forfeiture of a right. The Act affords a controlling board wide latitude to discharge a probationary teacher for subjective reasons as long as it provides the teacher the necessary notice of discharge. In Lipka v Brown City Schools (on rehearing) 403 Mich 554; 271 NW2d 771(1978), the Michigan Supreme Court held:

> A probationary period is provided in the act and distinguished from tenure to afford a trial period during which a controlling board may make a subjective determination of whether a certain teacher satisfied that district's particular need and policy. We should not require that such a procedure meet an objective standard applicable to all school districts.
>
> ***
>
> The tenure commission may not assay a board's reason for concluding the work [of a probationary teacher] unsatisfactory. The act is followed when the notice of unsatisfactory work is timely given whether based on good, bad or unstated reasons. If timely notice of unsatisfactory work is given, no entitlement to tenure arises under the act, and therefore the Due Process Clause does not require a hearing. (Citation omitted.)

In the instant case, appellee chose not to provide an IDP to appellant as it is entitled not to do. In view of this discretionary right, I am not pursuaded that appellant made a legally justified case in support of his position that appellee was required to formulate an IDP for him. Therefore, appellee's motion on the issue of the IDP is granted.

As a second assignment of error, appellant, relying on Section 1526 of the Michigan Revised School Code, MCL 380.1526; MSA 15.41526, contends that appellee should have provided him with a mentor. Appellant claims appellee's failure violated both the spirit and intent of that law. Further, even if the Act does not require appellee to provide a mentor and for that reason the Commission is without jurisdiction to hear this issue, appellant argues that the Commission has "jurisdiction in requiring that annual year-end evaluations not provide false information that mentors were provided when no mentors were provided."

Appellee argues that appellant's second assignment of error, is subject to accelerated judgment because it raises issues outside the Act and, therefore, the Commission is without jurisdiction to adjudicate this issue. Appellee relies on Rockwell v Crestwood Board of Education, 393 Mich 616, 630; 227 NW2d 736(1975) and Kramer v Van Dyke Public Schools, 134 Mich App 479, 488; 351 NW2d 572(1984), to assert that it is entitled to accelerated judgment, pursuant to R 38.154 and MCL 38.137; MSA 15.203, claiming that the Commission has no jurisdiction to decide this issue.

The Tenure Act does not require appellee to provide a mentor to appellant. A school board is within its right to discharge a first-year probationary teacher for any reason as long as it follows the notice requirements. While providing a mentor is a useful device to assist a teacher in improving his/her performance, the absence of a mentor can not be used to defeat a board's right to discharge a first-year probationary teacher whose performance is found to be unsatisfactory, subject to the notice requirement. Therefore, appellee's motion is granted on this issue.

Appellant's assignments of error numbers 3, 5, 7, 8, 9 and 10 all relate to contractual and/or constitutional due process violations. Appellant's third assignment of error relies on the implied or express contractual language of the collective bargaining agreement regarding suitable working conditions which appellant alleges was violated. The fifth assignment of error pertains to failure to hold an evaluation conference to review the written evaluation before its finalization. The seventh assignment of error refers to appellee's failure to hold a conference following an observation. The eighth assignment of error pertains to the lack of specificity of a document entitled Evaluation Of Teacher's Effectiveness. Assignments 9 and 10 deal with lack of union representation or of the union representative of appellant's choice.

To assert a contractual and/or constitutional due process violation, appellant has to assert that the Commission has jurisdiction to decide these issues. In Berlin v Board of Education of the Oak Park School District (90-30) citing Helsom v Board of

Education of the Northwest School District (84-42), the Commission held that it is "fully authorized to resolve issues relating to the terms of a collective bargaining agreement in the course of and incidental to deciding claims under the Act." Here, appellant asserts violation of contractual and/or constitutional due process as a basis without any reference to specific rights under the Teachers' Tenure Act for asserting jurisdiction. Thus, the Commission is without jurisdiction to hear appellant's claim of appeal on the above-stated assignments of error. Appellee's motion for accelerated judgment on these issues is granted.

Appellant asserts under the fourth assignment of error that appellee failed to provide him notice of when the board was going to consider his case. Appellee alleges that it had provided the necessary notice. There is no requirement in the Act that a teacher be provided notice of when a controlling board will meet to decide whether to issue notice of unsatisfactory service to a probationary teacher. The board is empowered to dismiss a teacher who has not completed his/her first year provided the teacher is given written notice that his/her performance is unsatisfactory 60 days before the close of the school year. There is no dispute that such notice was provided to appellant. Appellee's motion on this issue is granted.

Appellant's sixth assignment of error states that appellee failed to hold two classroom observations sixty days apart pursuant to MCL 38.83a; MSA 15.1983(1). Appellee avers that it had conducted eleven observations over the course of the year and these observations, in the aggregate, satisfy the 60-

day requirement. (See Exhibit 1 of appellee's motion) . Appellant's contention is that the last two observations were not sixty days apart, not that the observations in the aggregate were not sixty days apart. Based on appellee's affidavit, it has satisfied the requirement that its observations be 60 days apart. Therefore, appellee's motion for accelerated judgment is granted on this assignment of error.

CONCLUSION

I have reviewed appellant's assignments of error and find them well thought out and interesting. However, for the reasons stated above, they could not withstand the legal challenges posed by appellee. Therefore, appellee's motion for accelerated judgment is granted.

Appellee's motion for accelerated and summary judgment is granted and, for this reason, appellant's claim of appeal is dismissed.

/s/ Tessema Berga
Administrative Law Judge
Dated: August 27, 1999

APPENDIX C

STATE OF MICHIGAN
STATE TENURE COMMISSION

DR. MICHAEL J. GARCIA,
Appellant

v Docket No. 99-13

BOARD OF EDUCATION OF THE
EATON RAPIDS PUBLIC SCHOOLS,
Appellee

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DECISION AND ORDER

BACKGROUND FACTS

Appellant was employed as a teacher by appellee during the 1998-99 school year. In April of 1999,

appellee board took action to find appellant's work unsatisfactory and terminated his employment. Appellant filed an appeal with this Commission complaining of various alleged errors in appellee's actions. On August 27, 1999, Administrative Law Judge Tessema Berga issued a Preliminary Decision and Order granting appellee's motion for accelerated and summary judgment and dismissing appellant's appeal. Appellant then retained legal counsel, and filed timely exceptions to the Preliminary Decision and Order. Appellee filed its brief in support of the Preliminary Decision and Order on September 23, 1999.

DISCUSSION

Appellant's petition asserted, *inter alia*, that appellee failed to adhere to the individualized development plan (IDP) procedures mandated by the Teachers' Tenure Act. Accordingly, appellant argued, that his work must be deemed to have been satisfactory as a matter of law. The statutory language states in pertinent part:

> Sec. 3a. (1) If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board . . . shall ensure that the teacher is provided with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least an annual year-end performance evaluation each year during the teacher's probationary

> period ... based on, but ... not limited to, at least 2 classroom observations held at least 60 days apart, unless a shorter interval ... is mutually agreed upon ..., and shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. This subsection does not prevent a collective bargaining agreement ... from providing for more performance evaluations or classroom observations in addition to those required in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.
>
> (2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular school year is conclusive evidence that the teacher's performance for that school year was satisfactory. MCL 38.83a; MSA 15.1983(1)

The ALJ relied on the Court of Appeals holding in VanGessel v Lakewood Public Schools 220 Mich App 37; 558 NW2d 248 (1996) to reject appellant's claim that his rights under the Act were violated because appellee failed to complete the IDP process during the first year by including an assessment of his progress on the IDP goals in his final evaluatione Appellant's exceptions assert that the ALJ erred in granting summary judgment based on

VanGessel because VanGessel only addresses a total failure to afford the protections of the IDP process. We have reviewed the VanGessel decision and we can find no practical or legal basis for the distinction appellant posits. This exception must be rejected.

Appellant next argues that the ALJ erred in granting summary judgment dismissing his assignments of error asserting violation of the School Code mentoring provision[1] and various violations of the collective bargaining agreement. Appellant asserts that the ALJ erred because such matters fall within this Commission's implicit responsibility to assess whether a school board's actions toward a probationary teacher have been taken in bad faith. As such, appellant maintains that appellee's failure to adhere to these requirements imposed by contract or by other statutes would be evidence of bad faith action. Moreover, appellant maintains that the case law the ALJ cited to support this holding supports this argument rather than undermines it.

While the case law cited in the Preliminary Decision and Order on this point may not have been *apropos*, consideration of claimed errors extraneous to Tenure Act rights must be tied to some claim or action arising from the Tenure Act for this administrative agency to validly exercise jurisdiction. See Fortuna v Board of Education of

---

[1] See MCL 380.1526; MSA 15.41526 requiring that school districts assign new teachers to a mentor or master teacher for their first three years of employment as a teacher.

the City of Detroit (79-57) . Moreover, appellant's assertion that this agency is somehow authorized to delve into the reasons underlying a school board's actions toward a probationary teacher flies in the face of the holding in Lipka v Brown City Community Schools (On Rehearing), 403 Mich 554; 271 NW2d 771 (1978) . Such claims are left to the courts to consider. See Paul Smith v Holly School District (79-25). We can find no error on this ground. This exception must be rejected.

Appellant's exceptions brief next argues that the ALJ erred in granting summary judgment dismissing appellant's assignment of error asserting that his final evaluation was not "based on" at least two observations conducted at least 60 days apart as required by the Act. Appellant maintains that summary judgment was improvidently granted because a material fact issue was presented on these matters. We cannot agree. Appellee's affidavit and supporting documentation show that appellant was observed 11 separate times beginning in September of 1998 and concluding in April of 1999. Appellant's submission in response to the motion concedes this point. (See paragraph 07) . Clearly, there is no fact dispute on whether or not appellee conducted at least two observations.

These observation dates are listed on the first page of the evaluation document and the number and time span of the observations are reiterated in the evaluation's "Overall Rating" section on the signature page of the narrative. Moreover, the principal's affidavit indicates that the evaluation was based on all these observations. While appellant's brief asserted that there were, factual

errors in appellee's submission, no affidavit was filed to raise the fact issue nor has appellant identified what facts were incorrectly stated. We agree with the ALJ's result. Appellant has failed to raise any viable factual dispute that the evaluation was based on at least two classroom observations. Finally, we find no legal or factual merit that the observations conducted by appellee failed to meet the requirement that there be a 60 day interval between the relevant observations. Appellant's own response conceded that a 60 day interval occurred between the December 3, 1998 observation and the February 17, 1999 observation. Moreover, this Commission has held that this provision is satisfied if the observations, in the aggregate, span the required 60 days. See Cummings v Board of Education of the Center Line Public Schools (98-18) (January 29, 1999). No error can be found under these theories.

Accordingly, we find that appellant's exceptions provided no basis for overturning the ALJ's Preliminary Decision and Order.

ORDER

We have read the record in this case and for the above stated reasons: It is hereby ordered that appellant's petition be dismissed.

/s/ Anne Cruce, Chairperson
/s/ Frances K. Sinelli, Secretary
/s/ Joseph Caimi, Member
/s/ James M. Cameron, Jr., Member
/s/ Judy Emmons, Member

DATED: November 8, 1999

APPENDIX D

Court of Appeals
State of Michigan

ORDER

Michael J. Garcia

v

EATON RAPIDS BOARD OF EDUCATION

Docket No. 223670

LC No. 99-000013

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

/s/ Donald E. Holbrook, Jr.
Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

January 28, 2000 /s/ Carl L. Gromek

APPENDIX E

Court of Appeals, State of Michigan

ORDER

Michael J. Garcia

v

EATON RAPIDS BOARD OF EDUCATION

Docket No. 223670

LC No. 99-000013

The Court orders the motion for rehearing is DENIED.

/s/ Donald E. Holbrook, Jr.
Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

April 6, 2000 /s/ Carl L. Gromek

APPENDIX F

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: October 30, 2000
116800(30)

Michael J. Garcia

Plaintiff-Appellant

v

SC: 116800
COA: 223670
TC: 99-000013

BOARD OF EDUCATION OF THE
EATON RAPIDS PUBLIC SCHOOLS,

Defendant-Appellee

On order of the Court, the application for leave to appeal from the January 28, 2000, decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 30, 2000

/s/ Jacqueline B. MacKinnon
Deputy Clerk

APPENDIX G

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: March 27, 2001
116800(30)

Michael J. Garcia
Plaintiff-Appellant

v

SC: 116800
COA: 223670
TC: 99-000013

BOARD OF EDUCATION OF THE
EATON RAPIDS PUBLIC SCHOOLS,

Defendant-Appellee

On order of the Court, the motion for reconsideration of this Court's order of January 28, 2000, is considered, and it is DENIED because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 27, 2001

/s/ Corbin R. Davis
Clerk

APPENDIX H
Michigan Supreme Court
Lansing, Michigan
ORDER
Entered: April 6, 2001
116800(30)

Michael J. Garcia

Plaintiff-Appellant

v

BOARD OF EDUCATION OF THE EATON RAPIDS PUBLIC SCHOOLS,

Defendant-Appellee

SC: 116800
COA: 223670
TC: 99-000013

AMENDMENT TO ORDER

On order of the Court, the order of March 27, 2001 is amended to correct a clerical error by correcting the text thereof to read as follows:

"On order of the Court, the motion for reconsideration of this Court's order of October 30, 2000, is considered, and it is DENIED because it does not appear that the order was entered erroneously."

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 6, 2001 /s/ Corbin R. Davis